No. 91-5397

In The

Supreme Court of the United States

October Term, 1992

EMERY L. NEGONSOTT,

Petitioner/Appellant,

vs.

HAROLD SAMUELS, WARDEN; and
ROBERT T. STEPHAN, ATTORNEY GENERAL
OF THE STATE OF KANSAS,

Respondents/Appellees.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 3243 confers criminal jurisdiction on the State of Kansas to prosecute petitioner for the crime of aggravated battery, committed on an Indian reservation when that crime also falls within the scope of the Major Crimes Act, 18 U.S.C. § 1153.

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MAY IT PLEASE THE COURT:

The instant habeas corpus case is before this Court on a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. For the reasons stated below, the respondents, Harold Samuels, Warden, and Robert T. Stephan, Attorney General for the State of Kansas, respectfully urge the Court to affirm the holding of the Tenth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the jurisdiction of the State of Kansas to prosecute a member of the Kickapoo Tribe pursuant to 18 U.S.C. § 3243 for the aggravated battery of another member of that Tribe, while on the Kickapoo Reservation. 18 U.S.C. § 3243 provides:

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The petitioner was convicted of having committed the state offense of aggravated battery in violation of K.S.A. 21-3414, which is defined as:

> "The unlawful touching or application of force to the person of another with intent to injure that person or another and which either: (a) Inflicts great bodily harm upon him; or (b) Causes any disfigurement or dismemberment to or of his person; or (c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted."

The state crime of aggravated battery also falls within the scope of the Major Crimes Act, 18 U.S.C. § 1153, which provides:

> "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

The predecessor to the current Major Crimes Act was the Act of Congress of March 3, 1885, § 9. This Act provided:

> "That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be tried therefor in the same courts and in the-same manner, and shall be subject to the same penalties, as are all other persons charged

with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The Federal Enclave Act as defined by 18 U.S.C. § 7 provides:

"The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, district, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or

concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes:

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a force landing, until the competent

authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States."

The assimilation of state law for federal enclaves is provided for by 18 U.S.C. § 13, which provides:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The adaptation of state law for federal enclaves was extended to Indian country with some limitation by 18 U.S.C. § 1152:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive

jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Eight years after the passage of the Kansas Act, 18 U.S.C. § 3243, Congress granted criminal jurisdiction to the State of Iowa, Act of June 30, 1948, Ch. 759, 62 Stat 1161, Pub.L. No. 846, which was modeled on the Kansas Act. It provides:

"That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservations in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

Congress subsequent to the passage of 18 U.S.C. § 3243, enacted Public Law 280, Pub.L 83-280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, which provides:

"That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

1162 State jurisdiction over offenses committed by or against Indians in Indian country.

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property

in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section"

Public Law 280 was amended to included additional states as set out in 18 U.S.C. § 1162 which provides:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian county listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."

STATEMENT OF THE CASE

The petitioner, Emery L. Negonsott, was convicted of aggravated battery in the state District Court of Brown County, Kansas. The petitioner is a member of the Kickapoo Tribe and the victim of his crime likewise was a member of that tribe. The offense occurred on the Kickapoo reservation located in the State of Kansas. The petitioner was prosecuted in the state District Court pursuant to the grant of criminal jurisdiction by the United States to the State of Kansas in 18 U.S.C. § 3243.

The petitioner contends that his prosecution for the state crime of aggravated battery in the state District Court of Brown County, Kansas was unlawful since the crime of aggravated battery is one of the enumerated crimes prohibited by the Major Crimes Act, 18 U.S.C. § 1153. Petitioner's argument is that only the United States District Court for the District of Kansas had jurisdiction to prosecute him for his criminal actions committed on the Kickapoo reservation.

The petitioner's state conviction has been upheld by the Kansas Supreme Court, *State v. Negonsott*, 239 Kan. 127, 642 P.2d 585 (1986), (JA. 3-10); the United States District Court for the District of Kansas, *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, 696 F.Supp. 561 (D.Kan. 1988), (JA. 11-16); and the United States Court of Appeals for the Tenth Circuit, *Negonsott v. Samuels, et al.*, 933 F.2d 818 (10th Cir. 1991), (JA. 17-30).

SUMMARY OF ARGUMENT

Congress possesses plenary authority over Indian tribes. Without Congressional authorization neither the federal government nor the various states have jurisdiction to prosecute crimes committed by or against Indians in Indian country. Congress, however, through its plenary power can legislate for the prosecution of offenses committed by or against Indians in Indian country in any manner that it deems appropriate.

Congress, by enactment of 18 U.S.C. § 3243, granted to the State of Kansas, jurisdiction to prosecute all crimes committed on reservations located in Kansas irrespective of the ethnicity of the victim or the offender. The 1940 passage of 18 U.S.C. § 3243 was the first of a series of congressional enactments providing for the prosecution by states, criminal offenses committed in Indian country.

The retention by 18 U.S.C. § 3243 of the jurisdiction already possessed by federal courts to prosecute crimes that fall within the scope of 18 U.S.C. §§ 1152 and 1153 does not restrict the complete criminal jurisdiction granted to the State of Kansas. The granting of complete jurisdiction to Kansas with a retention of a limited concurrent jurisdiction in the federal courts for the prosecution of crimes that fall within the scope of §§ 1152 and 1153 resulted from Congress' realization that is was desirable for the State of Kansas to have the authority to prosecute crimes that were already within the jurisdiction of the federal courts as well as crimes that were outside of the federal court's jurisdiction in order to provide effective law enforcement, while if the need arose in a particular situation, federal courts could exercise their

jurisdiction. The success of 18 U.S.C. § 3243 in providing effective law enforcement to the residents of reservations in Kansas was part of the natural progression that eventually resulted in Congress withdrawing the federal courts from criminal prosecutions entirely in states granted jurisidiction by Public Law 280.

ARGUMENT

WHETHER 18 U.S.C. § 3243 CONFERS CRIMINAL JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE PETITIONER FOR THE CRIME OF AGGRAVATED BATTERY, COMMITTED ON AN INDIAN RESERVATION WHEN THAT CRIME ALSO FALLS WITHIN THE SCOPE OF THE MAJOR CRIMES ACT, 18 U.S.C. § 1153

I. AUTHORITY OF CONGRESS TO DESIGNATE CRIMINAL JURISDICTION OVER INDIAN COUNTRY.

In the 109 years following this Court's decision in *Ex Parte: In the Matter of Kang-Gi-Shun-Ca; Otherwise Known as Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883), criminal jurisdiction on Indian reservations has been described as a "Jurisdictional Maze".[1] In 1940, Congress by passage of 18 U.S.C. § 3243, also referred to as the "Kansas Act", resolved the labyrinth issue of criminal jurisdiction over Indian reservations in Kansas by granting to Kansas criminal jurisdiction to the same extent as

[1] Clinton, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze." 18 Ariz L. Rev. 503 (1976).

its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

Congress by enactment of the "Kansas Act", simplified the jurisdictional maze that had evolved since the decision of *Crow Dog*, (supra). But for the passage of jurisdictional grants such as 18 U.S.C. § 3243 and 18 U.S.C. § 1162 to states, the jurisdiction for the prosecution of crimes in Indian country depends on a number of factors.[2] The prosecution of offenses committed on reservations located in states that have not been granted specific criminal jurisdiction by Congress depends on the nature of the crime, the ethnicity of the victim and perpetrator, (even the tribal affiliation), and the situs of the offense.

States are vested with jurisdiction over criminal offenses for all crimes regardless of the race of the participants if the offense is committed outside of Indian country. *De Marrias v. State*, 319 F.2d 845, 846 (8th Cir. 1963); *In re Wolf*, 27 F. 606, 610 (D.C. Ark. 1886); *Pablo v. People*, 23 Colo. 134, 135, 46 P. 636, 637 (1896); *Hunt v. State*, 4 Kan. 51, 55-56 (1866); *State v. Spotted Hawk*, 22 Mont. 33, 44, 55 P. 1026, 1028 (1899); *State v. Williams*, 13 Wash. 335, 339, 43 P. 15, 16 (1895); *People ex rel. Schuyler v. Livingstone*, 123 Misc. 605, 611-12, 205 N.Y.S. 888, 894 (Sup. Ct. 1924).

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[2] Congress has granted other states jurisdiction over offenses committed on Indian country; The Iowa Act, Act of June 30, 1948, ch. 759, 62 Stat. 1161; the North Dakota Act, Act of May 31, 1946, ch. 279, 60 Stat. 229; New York Act, Act of July 2, 1948, ch. 809, 62 Stat. 1224, codified at 25 U.S.C. 232; and California, Act of Oct. 5, 1949, ch. 604, 63 Stat. 705.

Likewise, states have jurisdiction for the prosecution of crimes committed on reservations by non-Indians against other non-Indians. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1881), *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), and *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946).

Jurisdiction in the federal courts pursuant to 18 U.S.C. § 1153 requires only that the perpetrator of one of the enumerated major crimes be Indian, the race of the victim is irrelevant. [18 U.S.C. § 1153, and *United States v. John*, 437 U.S. 634, 57 L.Ed. 2d 489, 98 S.Ct. 2541 (1978)].

Jurisdiction by the federal courts for non-major crimes is dependent on a diversity of the race of the offender and the victim. [18 U.S.C. § 1152; and *Williams v. United States*, 327 U.S. 711, 90 L.Ed. 962, 66 S.Ct. 778 (1946)]. If the victim and the offender of a non-major crime are not both members of the same tribe, the federal court has jurisdiction. *Duro v. Reina*, 495 U.S. 676, 109 L.Ed.2d 693, 110 S.Ct. 2053 (1990). Finally, if both the victim and the offender of a non-major crime are members of the same tribe, neither the federal courts nor the state has jurisdiction. 18 U.S.C § 1152 and *Duro v. Reina*, supra.

Finally, the resolution of the issue of what constitutes "Indian Country" is no easy task. See *United States v. John*, 437 U.S. 646, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978) for an illustration of the complexity involved in determining

whether the situs of the offense lies in Indian country.[3] Needless to say, a system as described above, is not an efficient or effective mechanism for providing law enforcement protection to a community, and was addressed in the legislative history of 18 U.S.C. § 3243. However, for crimes committed on Indian reservations in Kansas it is no longer necessary to determine the race of the suspect and the victim, nor determine whether the situs of the crime is an allotment or reservation property in order to determine whether the crime must be prosecuted in state or federal court.

Since the "Kansas Act" was the first Congressional attempt to resolve the jurisdictional maze by granting to a state criminal jurisdiction, 18 U.S.C. § 3243 provided that the Federal government, if the need arose could also exercise its jurisdiction. (cf. 18 U.S.C. § 1162).

The meaning of 18 U.S.C. § 3243 and its interplay with the Major Crimes Act, 18 U.S.C. § 1153, is clear when examined in the historical context of criminal jurisdiction in Indian Country. The history of the relationship between the federal government and the indigenous Indian Nations is tale of conflict not only between non-

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[3] The issue of whether land lies within a reservation has resulted in conflicting decisions in *Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D. Utah. 1981). On appeal 716 F.2d 1298, en banc 773 F.2d 1087 (10 Cir. 1985), cert . denied, 479 U.S. 994 (1986); and *State of Utah v. Perank*, 191 Utah Adv. Rep. 5 (July 17, 1992) and *State of Utah v. Hagen*, 191 Utah Adv. Rep. 26 (July 17, 1992). This series of cases have resulted in four determinations concerning whether the same property lies within the reservation boundaries.

Indian and Indian, but also between the federal government and the various states, and between the Executive and Judicial branches of the Federal Government.[4] The supremacy of Congress over the states regarding Indian matters was resolved in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).

After the resolution of the authority of states vis a vie Congress in respect to Indian country, this Court in 1883, was presented with the habeas action arising from a murder conviction of a member of the Sioux Nation for the murder of another Sioux. *Crow Dog*, supra. The murder was committed in Indian Country and the petitioner was sentenced by the District Court for the Dakota Territory. This Court held the Territorial Court was without jurisdiction to try the indictment and that the conviction and sentence were void.

Congress responded to the Court's decision in *Crow Dog* (supra) by enactment of the Major Crimes Act, found at Act of Congress of March 3, 1885, § 9. This Act provided:

> "That immediately upon and after the date of the passage of this Act all Indians committing

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[4] The conflict between states, the President and this Court is amply demonstrated in *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831). President Jackson in his response to the petition of the Cherokee Nation for protection from the state of Georgia, stated, "that the President of the United States has no power to protect them against the laws of Georgia". (*Cherokee Nation* at page 28). Furthermore, the state of Georgia in defiance of a writ of error allowed by Chief Justice Marshall of this Court executed an individual named Corn Tassel. (*Cherokee Nation* at page 29).

against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The Major Crimes Act of March 3, 1885, § 9 is the predecessor of 18 U.S.C. § 1153 and is substantially identical to the current Major Crimes Act. The Major Crimes Act of 1885 was examined by this Court in regard to an indictment of two members of the Hoopa Valley Indian Reservation pursuant to the Major Crimes Act of 1885 for the murder of another member of that reservation. *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109 (1886).

In *Kagama*, this Court held that Major Crimes Act of 1885 granted jurisdiction to the federal government to prosecute Indians that commit the enumerated crimes

against Indians and non-Indians. In reaching this conclusion, this Court pointed out the authority to govern Indian tribes is vested in Congress.

The lesson to be drawn from *Crow Dog* and *Kagama* is that while Congress possesses plenary authority over Indian Tribes, criminal jurisdiction of even the federal courts must be granted by Congress.

The plenary power of Congress to govern Indian Tribes is uncontroverted. This Court, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977), was presented with a controversy involving whether the Rosebud Sioux Reservation could be diminished in size by acts of Congress when a treaty provision requiring approval of three-quarters of the members of the tribe had not been met. In ruling that acts of Congress could reduce the size of the reservation, this Court stated:

> "Because of the reasons hereafter set forth in greater detail, we conclude that although the Acts of 1904, 1907, and 1910 were unilateral Acts of Congress without the consent of three-quarters of the members of the tribe required by the original treaty, that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the Reservation boundaries." At page 587.

This Court in deciding *Rosebud*, supra, relied on *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903), "Which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty." *Rosebud*, supra, at 588.

II. RETENTION OF JURISDICTION OVER MAJOR CRIMES BY THE FEDERAL GOVERNMENT DOES NOT LIMIT THE JURISDICTION GRANTED TO KANSAS.

The course of history concerning the relationship between Indian tribes, states and the Federal government is replete with attempts by states, and the executive branch of the federal government to unilaterally assert authority over Indian tribes without the authority of Congress. This Court's opinions in *Crow Dog*, supra, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832) clearly prohibit state and federal involvement in Indian affairs absent Congressional authority. This Court's annulment of Georgia's prosecution of a white missionary who entered the Cherokee Nation in contravention of Georgia law is but one example of when this Court has spoken of the exclusive authority of Congress to govern Indians. (*Worcester*, supra).[5]

In *Worcester*, this Court stated:

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the

[5] President Andrew Jackson's statement that, "John Marshall has made his decision; now let him enforce it", was made in response to the opinion of Chief Justice Marshall in *Worcester v. Georgia*. "Politics as Law: The Cherokee Cases", William F. Swindler.

> United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Worcester* at page 501.

The exclusion of states from asserting jurisdiction over Indian tribes has been uniformly applied by Courts. This Court has held that federal jurisdiction over those offenses committed by Indians that are covered by 18 U.S.C. § 1153 (the Major Crimes Act) is exclusive of state jurisdiction. *United States v. John*, 437 U.S. 634, 651, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978); see also *Seymour v. Superintendent*, 368 U.S. 351, 359, 7 L.Ed.2d 346, 82 S.Ct. 424 (1962). The Court has also repeatedly stated (albeit in dictum) that federal jurisdiction over other crimes under 18 U.S.C. § 1152 likewise is exclusive of state jurisdiction. *Williams v. United States*, 327 U.S. 711, 714, 90 L.Ed. 962, 66 S.Ct. 778 (1946); *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979). A number of state courts have held likewise. See *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Arguette v. Schneckloth*, 351 P.2d 921 (Wash. 1960); *In re Application of Denetclaw*, 320 P.2d 697 (Ariz. 1958); *State v. Kuntz*, 66 N.W.2d 531 (N.D. 1954); see also *State v. Warner*, 379 P.2d 66, 68-69 (N.M. 1963) (dictum); *State v. Jackson*, 16 N.W.2d 752, 754 (Minn. 1944) (dictum); 30 Op. Or. Att'y Gen. 11 (1960).

However, as was pointed out by this Court in *Kagama*, supra, in its analysis of the 1885 version of the Major Crimes Act providing criminal jurisdiction to federal courts,

> "[t]he statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has *done* this, and *can* do it with regard to all offenses relating to matters to which the federal authority extends. (Emphasis in the original). *United States v. Kagama*, 118 U.S. 228, 231.

Likewise, the language of 18 U.S.C. § 1153 contains no limitation upon the powers of a state. If Congress determines that it is desirable to grant criminal jurisdiction to a state and retain concurrent jurisdiction in the federal government over major crimes, the provisions of 18 U.S.C. § 1153 would not be amended.

The authority of Congress over Indian affairs is plenary. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903). There is nothing to prohibit Congress from granting to the State of Kansas complete jurisdiction over all crimes committed against or by Indians within the boundaries of the State, while retaining concurrent jurisdiction by the Federal Government to prosecute offenses defined by 18 U.S.C. § 1153.

III. CONGRESS INTENDED THAT KANSAS EXERCISE COMPLETE CRIMINAL JURISDICTION OVER CRIMES COMMITTED ON INDIAN RESERVATIONS WITHIN THE STATE.

The 1940 passage of 18 U.S.C. § 3243 was the first time that Congress granted any type of criminal jurisdiction over Indian reservations to a state. It stands to reason that due to the experimental nature of the granting of jurisdiction to a state over crimes committed by Indians or against Indians on reservations, Congress intended to retain an alternative for criminal prosecution in the event the state of Kansas failed to carry out its responsibility of providing police protection to the residents of the reservations within its borders. This alternative is provided for by the retention of the jurisdiction granted to federal courts by 18 U.S.C. §§ 1153 and 1152.

It was not until the passage of Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, thirteen years after the enactment 18 U.S.C. § 3243, that Congress determined criminal jurisdiction could be granted to selected states with the complete withdrawal of the federal government from the arena of criminal prosecutions. Congress' decision to retain federal court jurisdiction over a handful of crimes when it enacted 18 U.S.C. § 3243 does not entail that such retention was at the exclusion of Kansas courts. Petitioner's argument that retention of 18 U.S.C. § 1153 federal court jurisdiction negates the clear language of a granting of complete criminal jurisdiction to the State of Kansas is without merit.

Petitioner's argument ignores the fact that the "exclusivity" of the criminal jurisdiction of the federal

courts over Indian reservations is not due to any inherent power of federal courts but is rather due to the policy decision of Congress to place jurisdiction with the federal courts and the absence of a Congressional grant of jurisdiction to the states. The absence of a Congressional granting of jurisdiction to a state prior to 1940 has no bearing in the instant case in light of the clear intent expressed by the provision of 18 U.S.C. § 3243 that,

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."

The proviso of 18 U.S.C. § 3243 that,

> "This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

does not serve to create an exclusive jurisdiction in the federal courts for offenses under 18 U.S.C. § 1153. The entire legislative history of 18 U.S.C. § 3243 indicates that the retention of federal court jurisdiction was intended to provide the alternative of a limited concurrent federal jurisdiction in the event the state of Kansas failed to prosecute a crime defined by both Kansas state law and the Major Crimes Act and did not limit the total jurisdiction granted to Kansas.

The issue of whether the retention of jurisdiction in the federal courts provided by the second paragraph of

18 U.S.C. § 3243 constituted a limitation on the language of the first paragraph granting complete jurisdiction to Kansas has been litigated in two United States Circuit Courts and the Supreme Court of Kansas.

The Eighth Circuit addressed the applicability of the jurisdictional grant to the state of Iowa, 62 Stat. 1224, Ch. 809 which was modeled after the Kansas grant. The Eighth Circuit in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir. 1977) found that the state of Iowa did not possess jurisdiction over major crimes. The *Youngbear* decision was initially applied by the Kansas Supreme Court in *State v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982). The Kansas Supreme Court, however, when presented the issue again rejected the analysis of *Youngbear* and reversed the holding of *Mitchell* in *State v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). (*State v. Negonsott*, was the final state court decision that gave rise to petitioner's federal habeas action on certiorari to this court and is found at JA 3-10).

The Tenth Circuit Court of Appeals in *Iowa Tribe of Indians v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986), also had occasion to review the interplay between 18 U.S.C. § 3243 and the General Crimes Act of 18 U.S.C. § 1152. The Tenth Circuit in *Iowa Tribe of Indians* did not address the interplay between the Major Crimes Act, 18 U.S.C. § 1153 and the Kansas Act 18 U.S.C. § 3243 since the crime involved in that case was gambling which is not within the scope of the Major Crimes Act. However, the Tenth Circuit in *Iowa Tribe*, found that Congress by passage of 18 U.S.C. § 3243 did intend to grant to the State of

Kansas jurisdiction over non-major crimes that had previously been within the exclusive province of federal jurisdiction by virtue of the Assimilative Crimes Act, 18 U.S.C. § 13, and the General Crimes Act, 18 U.S.C. § 1152.

Without a Congressional creation of jurisdiction to be held concurrently by the State of Kansas and the Federal Government through enactment of 18 U.S.C. § 3243, jurisdiction over interracial non-major crimes is held exclusively by the Federal Government. *Williams v. United States*, 327 U.S. 711, 90 L.Ed. 962, 66 S.Ct. 778 (1946). Since the Kansas Act 18 U.S.C. § 3243 did not amend the application of either the Major Crimes Act (18 U.S.C. § 1153) or the General Crimes Act (18 U.S.C. § 1152), to the reservations located in Kansas, petitioner's agrument that Kansas can not prosecute crimes that fall within the scope of the Major Crimes Act would equally apply to crimes that are within the scope of the General Crimes Act. The Tenth Circuit Court of Appeals in *Iowa Tribe of Indians v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986) held that Kansas was granted concurrent jurisdiction to prosecute crimes that fell within the scope of the General Crimes Act. The same concurrent jurisdictional authority was intended by Congress in regard to major crimes.

Contrary to the holding of the Tenth Circuit in the *Iowa Tribe of Indians* and its decision in the instant case, the Eighth Circuit in *Youngbear* (549 F.2d 74) found that 18 U.S.C. § 3243 did not provide for any type of concurrent jurisdiction by the State of Kansas and the Federal Courts.

The United States District Court in *Youngbear*, (415 F.Supp. 807) in discussing 18 U.S.C. § 3243, misinterpreted the significance of the fact that the original bill to extend jurisdiction to the State of Kansas was entitled "Relinquishing Concurrent Criminal Jurisdiction to the State of Kansas in Indian Cases". That Court reasoned that since the term "concurrent" was struck from the bill, it was Congress' intent to retain exclusive jurisdiction of Major Crimes in the Federal Court. This conclusion is not supported by the Congressional intent as shown by the Senate and House of Representatives Committee Reports. 76th Congress, 3rd Session, Senate Report 1523; 76th Congress 3rd Session, House Report 1999. (Appendixes to Respondents' Brief, "A" and "B" respectively).

These reports reveal that the original title of the act was not changed for the purpose of establishing exclusive federal jurisdiction, but rather, was changed due to the realization that the federal government had not assumed jurisdiction over all crimes in Indian Country and that it would be improper to say Kansas had concurrent jurisdiction with the federal government when Congress was delegating jurisdiction to Kansas that had not been given to federal courts. In other words, inclusion of the term "concurrent" was erroneous because the statute conferred broader jurisdiction on the state than the federal government actually exerted itself.

> "However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes,

whether major or minor, defined by State law. *Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining,* however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: 'To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations,' and that all after the enacting clause of the bill be stricken out and the following substituted:

'That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations'." Senate Report 1532, (App. A at A5-A6). (Emphasis added.)

The Committee in the House had the same opinion. House Report 1999 (App. B at B6).

It is also significant that Congress realized that Kansas had on its own addressed the lack of law enforcement

on reservations by maintaining criminal prosecutions.[6] Since the legality of Kansas' assumption of jurisdiction without Congressional authorization was open to serious question, just as was Georgia's actions in *Worcester,* supra, the purpose of § 3243 was to authorize the historic practice of Kansas.

> "With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, *including those covered by Federal statutes.* The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State." Senate Report 1523, (App. A at A3); House Report 1999, (App. B at B4). (Emphasis added).

These Congressional reports indicate that federal enforcement of federal criminal law had been unsatisfactory on the Indian reservations in Kansas. In supporting the bill as amended and passed, both the Senate and

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[6] In 1940, 154 Indians resided in Brown County, Kansas. United States Department of Commerce, Sixteenth Census of the United States: 1940, Vol II, table 25. In 1980, the Indian census for Brown County, Kansas was 89. Census of Population; Characteristics of American Indians by Tribes and Selected Areas: 1980, volume 2, PC80-2-1C, page 124, Issued September 1989 U.S. Department of Commerce. The effectiveness and efficiency of either the tribe or the federal government in providing law enforcement protection to such a small group of individuals when state law enforcement is readily available supports Congress's decision to permit Kansas to exert jurisdiction for the protection of that community.

House committees stated that Kansas should have criminal jurisdiction over offenses currently provided for by federal law as well as those crimes not addressed by federal statute.

> "The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in *any particular instance* where this course may be deemed advisable.
>
> Accordingly, the enactment of S. 372, amended as proposed in the report of this department, appears to offer the best solution for the present undesirable situation." House Report 1999, (App. B at B12); Senate Report 1523, (App. A at A11). (Emphasis added).

It is clear that Congress, by providing that the federal government retain the jurisdiction that it had, did not intend that such retained jurisdiction would result in the exclusion of Kansas jurisdiction. Congress wished to remedy the lack of enforcement on the part of the Federal Government by passage of 18 U.S.C. § 3243. Not only does the legislative history of the Kansas Act contradict

the rationale of *Youngbear*, the history of the Iowa jurisdictional grant also clearly points out that the jurisdictional grant to Kansas and Iowa were total.

> "This bill follows the language of the act of June 8, 1940 (54 Stat. 249) which conferred on the State of Kansas criminal jurisdiction over the four Indian reservations in that State. Reports received are to the effect the act is working very satisfactorily in Kansas. This bill is also similar to the Act of May 31, 1946 (60 Stat. 229) which conferred on the State of North Dakota criminal jurisdiction over the Devils Lake Indian Reservation. That act is also working satisfactorily. *While under this bill the State officers and the State courts will have jurisdiction over all offenses, the proviso reserves a right in the Federal court to exercise jurisdiction in the class of cases indicated. In practice, the chances are that most cases will be handled in the State courts. This is understood to be the practice in Kansas*". Senate Report 1490, 80th Congress 2nd Session. (Emphasis added).

Congress has simplified the jurisdictional maze regarding crimes committed on Indian reservations. In order to determine the applicability of the Major Crimes Act now codified at 18 U.S.C. § 1153, an analysis of the race of the defendant, the victim and a title search of the site of the offense is necessary. To avoid this confusion in an effort to provide all persons including Indians with effective police protection, Congress enacted a series of jurisdictional grants to selected states. Beginning with the Kansas Act in 1940 and shortly thereafter with the Act of May 31, 1946 (60 Stat. 229, Ch. 279) Devils Lake Indian Reservation, North Dakota; Act of June 30, 1948 (62 Stat. 1161, Ch. 759), Sac and Fox Indian Reservation, Iowa; Act

of July 2, 1948 (62 Stat. 1224, Ch. 809), New York; Act of October 5, 1949 (63 Stat. 705, Ch. 604), Aqua Caliente Indian Reservation, California; Congress granted to specific states jurisdiction over criminal offenses committed on Indian reservations. Finally, Congress in 1953, thirteen years after Kansas had been granted jurisdiction under 18 U.S.C. § 3243, enacted Public Law 83-280, ch. 505, 67 Stat. 588 which is now codified at 18 U.S.C. § 1162. With the passage of 18 U.S.C. § 1162, Congress removed the federal system from criminal prosecutions in the States that were granted jurisdiction under that statute. This legislative progression clearly shows that initially Congress intended to share concurrent jurisdiction over major crimes with Kansas and eventually removed the federal government from major crime prosecution entirely in Public Law 280 states.

An argument that since Kansas is not one of the States granted exclusive jurisdiction under 18 U.S.C. § 1162 is irrelevant. Congress by passage of 18 U.S.C. § 3243 intended that if the need arose in any particular instance where federal prosecution was advisable that course of action would still be available. House Report 1999, (App. B at B12); Senate Report 1523 (App. A at A11). Since Kansas was the first state to be granted criminal jurisdiction, it was prudent for Congress to retain federal court jurisdiction if needed.

The canon of construction that laws must be liberally construed to favor Indians and not to their prejudice does not dictate that 18 U.S.C. § 3243 must be interpreted as excluding from Kansas jurisdiction over Major Crimes. This Court in *Andrus v. Glover Const. Co.*, 446 U.S. 608, 64 L.Ed.2d 548, 100 S.Ct. 1905 (1980) stated, " . . . although

the 'rule by which legal ambiguities are resolved to the benefit of the Indians' is to be given the broadest possible scope '[a] canon of construction is not a license to disregard clear expressions of congressional intent' ", at page 619. The legislative history of 18 U.S.C. § 3243 is clear in that Congress intended to grant to the State of Kansas complete, albeit not exclusive, jurisdiction over Indian crimes and that federal courts if the need should arise in any particular case could exercise its jurisdiction over major crimes. House Report 1999, (App. B at B12); Senate Report 1523 (App. A at A11).

It must also be pointed out that in light of the Congressional findings set out in the legislative history of 18 U.S.C. § 3243, an interpretation of 18 U.S.C. § 3243 which limits criminal jurisdiction on the part of Kansas does not benefit the people that reside on reservations in Kansas. Denial of state police protection to the reservation when the Tribal Councils of the four Kansas tribes had recommended to Congress that legislation be enacted to legitimize the historic practice of state prosecution of crimes already covered by federal statute as found in the legislative history would not benefit the residents of the reservation that are the victims of crime.

In addition to the benefit provided to the members of Tribes located in Kansas, complete criminal jurisdiction by Kansas is not prejudicial to Indian criminals. It is of import that petitioner makes no claim that he did not receive a fair trial in the District Court of Brown County, Kansas. Furthermore, application of 18 U.S.C. § 3243 to crimes that also fall under the Major Crimes Act does not unjustly impact Indian defendants by subjecting them to the potential of being prosecuted by two jurisdictions.

The application of a double jeopardy bar in the context of an Indian reservation was addressed by this Court in *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978). In *Wheeler*, a member of the Navajo Tribe was prosecuted by the Tribe for contributing to the delinquency of a minor and the defendant was also indicted for violating the Major Crimes Act for statutory rape. In *Wheeler*, the dual prosecution was not barred because both the Federal and Tribal government possessed independent sovereign powers to prosecute crimes. However, in the case now pending before this Court, Kansas' jurisdiction is granted by Congress and therefore Kansas, as far as Indian jurisdiction is concerned, is only an arm of the Federal Government.

Successive prosecutions by nominally different prosecuting entities are barred if the prosecuting jurisdiction emanates from the same sovereignty. *Wheeler*, at page 318. Here, unlike in *Wheeler*, Kansas has no jurisdiction but for 18 U.S.C. § 3243.

Finally, an examination of the criminal jurisdictional maze that existed prior to the "Kansas Act" demonstrates that the grant of complete jurisdiction to the state of Kansas constitutes no greater interjection of non-Indian jurisdiction on reservation lands than would exist under petitioner's argument for limited jurisdiction and points out that the jurisdiction that petitioner contends was transferred to Kansas is truly insignificant in addressing the problems identified by Congress.

The Major Crimes Act (18 U.S.C. § 1153) provides for the prosection of major crimes committed by Indians against Indians or non-Indians, removing the jurisdiction

to prosecute those crimes from tribes. The General Crimes Act (18 U.S.C. § 1152) provides for the prosecution of interracial crimes committed by Indians against non-Indians or vice versa. States already have jurisdiction to prosecute non-Indians for crimes committed against non-Indians on reservations. The remaining crimes committed on reservations not covered by federal or state jurisdiction are only minor crimes committed by Indians against Indians of the same tribe; the jurisdiction for the prosecution of those crimes had been within the jurisdiction of tribes. Ironically, jurisdiction over intra-tribal minor crimes is the only jurisdiction contended by petitioner to have been granted by 18 U.S.C. § 3243 to the State of Kansas.

Petitioner must concede that even under his view of the scope of 18 U.S.C. § 3243, Kansas would be permitted to prosecute crimes that had been reserved for disposition by the tribe itself thus leaving the only issue as whether the federal courts or state courts of Kansas can prosecute crimes under §§ 1152 and 1153. In either case, Indian criminals will be prosecuted by a non-tribal jurisdiction. A limited view of the jurisdiction granted to Kansas by Congress would do nothing to remedy the problems so eloquently described by the legislative history in determining whether the federal courts have jurisdiction in the first place.

In addition to the cannon of construction that ambiguities be resolved to the benefit of the tribes, this Court is familiar with the judicial principle that legislative acts are to be interpreted in the manner that gives meaning to all of the statute's language. *Moskal v. United States*, 498 U.S. 103, 112 L.Ed.2d 449, 111 S.Ct. 461 (1990); *Colautti v.*

Franklin, 439 U.S. 379, 392, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979); and *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 86 L.Ed.2d 168, 105 S.Ct. 2587 (1985). The respondents' interpretation that 18 U.S.C. § 3243 granted to the state of Kansas complete jurisdiction with a retention of concurrent jurisdiction already possessed by the federal courts gives vitality to all of the language of that act. In *Mattz v. Arnett*, 412 U.S. 481, 37 L.Ed.2d 92, 93 S.Ct. 2245 (1973), this Court looked to the language and purpose of an act as well as the historical background, including the reports from the Interior Department in order to determine the status of a reservation. Likewise in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 51 L.Ed.2d 660, 97 S.Ct. 1361 (1977), this Court gave weight to language proposed by the Secretary of Interior incorporated in legislation for the interpretation of Congressional intent.

In the present case the legislative history is clear in identifying 1) the gap in federal law enforcement jurisdiction whereby,

> "[f]ederal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts." Senate Report 1523 (App. A at A3); House Report 1999 (App. B at B3);

2) the historical practice of the state of Kansas "undertaking the trial and punishment of offenses committed on these reservations, including those covered by Federal

statutes." (App. A at A3) and (App. B at B4); 3) the desire of Tribes located in Kansas for enactment of legislation authorizing the state of Kansas to continue its practice of prosecuting offenses including those covered by federal statute. (*Id*); 4) the difficulty in determining what constituted reservation land due to the interspersal of unrestricted patents among most of the allotted lands. (App. A at A4) and (App. B at B4); and 5) the intent of Congress to grant to the state of Kansas complete criminal jurisdiction while retaining the potential for

> "prosecution in the Federal courts of those offenses which are now open to such prosecution. . . . in any particular instance where this course may be deemed advisable." Senate Report 1523 (App. A at A11); House Report 1999 (App. B at B12).

All of the concerns identified by the Department of Interior regarding criminal jurisdiction over reservations in Kansas are remedied by the respondents' interpretation of 18 U.S.C. § 3243. The language proposed by the Department of Interior whereby Kansas would have complete criminal jurisdiction while retaining the federal courts limited jurisdiction if the need arose was adopted in its entirety by Congress in passage of 18 U.S.C. § 3243.

In Conclusion, the State of Kansas was the first state to be given jurisdiction by Congress over crimes committed on reservation lands. Congress saw the clear need for this legislation to meet the law enforcement needs of the tribes in Kansas. Since this was the first time that Congress had embarked upon the course of permitting a state to be involved in the prosecution of crimes on a reservation, Congress wanted to insure that in any particular case if the need arose, the federal government retained its

authority. Therefore, Congress intended that 18 U.S.C. § 3243 grant to Kansas complete jurisdiction over all crimes with the retention on the part of the federal courts its limited jurisdiction. Years later as the success of the Kansas experiment became clear, Congress through the passage of Public Law 280 abdicated the role of the federal courts entirely in those states that were granted jurisdiction pursuant to Public Law 280. Therefore, the respondents pray the decision of the Tenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX A

Calendar No. 1579

76TH CONGRESS) SENATE (REPORT
3D SESSION) (No. 1523

RELINQUISHING CONCURRENT CRIMINAL JURISDICTION TO STATE OF KANSAS IN INDIAN CASES

APRIL 25 (legislative day, APRIL 24), 1940. – Ordered to be printed

MR. THOMAS of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 372]

The Committee on Indian Affairs, to whom was referred the bill (S.372) to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations, having considered the same, report thereon with the recommendation that it do pass with the following amendments:

Strike out all after the enacting clause and substitute the following:

> That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts

have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Amend the title so as to read:

A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations.

After receipt of this bill by your committee, it was referred to the Secretary of the Interior for further consideration and report, and thereafter, on March 16, 1940, he submitted his report, together with a suggestion that the bill be amended as herein recommended.

A full explanation of the purpose of this proposed legislation is contained in the said report of the Secretary of the Interior dated March 16, 1940, a copy of which is attached hereto and made a part of this report as follows:

DEPARTMENT OF THE INTERIOR,
Washington, March 16, 1940.

Hon. ELMER THOMAS,

Chairman, Committee on Indian Affairs, United States Senate.

MY DEAR SENATOR THOMAS: Further reference is made to your request for a report on the bill, S. 372, entitled "A bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations."

For the reasons outlined in this letter and the enclosed memorandum, I recommend favorable consideration of S.372, amended, for clarification, as proposed in this report.

The Federal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts. As the authority of the several States over wrongful or illicit acts committed upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men, the maintenance of law and order within Indian reservations is largely dependent upon tribal law and tribal courts. In the case of the four Kansas reservations, however, no tribal courts have existed for many years, and the Indians do not desire their reestablishment at this late date. With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Moreover, due to the breaking up of the Kansas reservations through the issuance of unrestricted patents for most of the allotted lands, considerably more than two-thirds of the area within the reservation boundaries has passed beyond Federal jurisdiction in criminal matters, which under existing laws extends for the most part

only to tribal and restricted lands, and has become subject to the general penal laws of Kansas and to its police authorities and criminal courts. The holdings that remain within the sphere of Federal jurisdiction are scattered in checkerboard fashion among the unrestricted holdings, thus subjecting the maintenance of law and order to many practical difficulties that can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative convenience extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as to those which are not.

The situation S. 372 is designed to remedy presents some quite complex factors and a memorandum developing in more detail the justifying circumstances is enclosed.

Since the tribes concerned desire the authorization and continuance of the criminal jurisdiction hitherto exercised by the State courts, and since the checkerboard pattern of the land technically subject to Federal jurisdiction makes other arrangements difficult of administration, the conferring of jurisdiction in criminal matters on the State of Kansas, as proposed in S. 372, appears desirable. It is obvious that unless the State is permitted to exercise criminal jurisdiction over all lands within the reservation boundaries, various wrongful and illicit acts will probably escape punishment altogether, in view of the limited scope of the Federal penal statutes applicable to Indian reservations, and in view of the impracticability of reestablishing the tribal courts without the full concurrence of the Indians. Enactment of the bill will not prevent the prosecution in the Federal courts of those acts

which are within the cognizance of these courts under existing law. While I do not wish to be understood as approving in general the relinquishment of criminal jurisdiction over tribal Indians to the States where their reservations are located, I believe the peculiar factors which exist in the case of the Kansas tribes justify the enactment of S. 372.

However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to "relinquish concurrent jurisdiction" to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: "To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations," and that all after the enacting clause of the bill by stricken out and the following substituted:

"That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as

its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The Director of the Bureau of the Budget has advised me that there is not objection to the presentation of this report to your committee.

Sincerely yours,

E.K. BURLEW,
Acting Secretary of the Interior.

Enclosure.

MEMORANDUM ON S. 372

The Federal criminal statutes applicable to Indian reservations do not provide a complete code for the maintenance of law and order within these reservations. Insofar as offenses committed by Indians against Indians are concerned, virtually the only acts penalized by Federal law are the 10 major crimes listed in section 328 of the Criminal Code, as amended (18 U.S.C. 548), and the jurisdiction over all other offenses where both the offender and the victim are Indians is relegated to the tribes by section 2146 of the Revised Statutes, as amended (25 U.S.C. 218). Insofar as offenses committed by Indians against white men or by white men against Indians are concerned, "the general laws of the United States as to the punishment of crimes committed in any place within

the sole and exclusive jurisdiction of the United States, except the District of Columbia," are extended to Indian reservations by section 2145 of the Revised Statutes (25 U.S.C. 217). However, the Federal penal statutes applicable to places within the sole and exclusive jurisdiction of the United States, as set out in sections 272-288 and 311-322 of the Criminal Code (18 U.S.C. 451-467, 511-522), cover only a limited number of offenses. And while for the purpose of filling in the gaps in this list, section 289 of the Criminal Code, as amended (18 U.S.C., Supp. IV, 468), extends certain State criminal laws to places under the exclusive jurisdiction of the United States, the application of this provision to Indian reservations over which the United States has not acquired exclusive political jurisdiction from the State is extremely uncertain.

Offenses by Indians against non-Indians which fall within the 10 major crimes enumerated in section 328 of the Criminal Code, as amended, are expressly brought within the jurisdiction of the Federal courts by that section, but offenses by non-Indians against Indians are not subject to section 328, irrespective of their character. Insofar as offenses committed by white men against white men are concerned, the Supreme Court has held that the Federal statutes are inapplicable and that the trial and punishment of such offenses is a matter for the State, except where the reservation is located on lands over which the United States has acquired exclusive political jurisdiction by cession or otherwise (*United States v. McBratney,* 104 U.S. 621; *Draper v. United States,* 164 U.S. 240). In addition, a few other Federal criminal statutes, prohibiting for the most part the introduction or sale of

intoxicating liquors, apply specifically to Indian reservations, and, of course, the general penal statutes which under the Constitution operate in all parts of the United States, such as those pertaining to counterfeiting, extend to these reservations.

On the four Indian reservations in Kansas, however, there are no tribal courts and there have been none for many years. In the absence of such courts, offenses committed on these reservations and involving Indians have been prosecuted in the State courts, even where the criminal act charged constituted one of the major offenses listed in section 328 of the Criminal Code. For a considerable period the State courts accepted jurisdiction in the cases thus brought before them. These State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction. Recently, however, the authority of the State courts to proceed in these cases has been questioned, and it now appears that they are actually without authority to entertain such proceedings, as no jurisdiction over criminal offenses involving Indians has been relinquished to Kansas. Since tribal courts do not exist on the Kansas reservations, and since the jurisdiction of the Federal courts extends only to limited categories of offenses, many acts universally deemed wrongful, as, for example, the embezzlement by one Indian of money belonging to another Indian may escape punishment if the present situation is not remedied.

Moreover, the breaking up of the Indian reservations in Kansas through the issuance of unrestricted patents for most of the allotted lands has made the maintenance of

law and order by Federal authority administratively difficult. The superintendent in charge of these reservations reports that out of a total of about 115,900 acres of reservation land allotted to Indians of the four Kansas tribes only 34,937 acres remain in trust. The trust holdings are intermingled in checkerboard fashion with the approximately 80,963 acres of unrestricted holdings within the reservation boundaries. As Federal jurisdiction in criminal matters is at present almost wholly confined to tribal and restricted lands, and as the general criminal jurisdiction of the several States extends to unrestricted Indian allotments, it follows that considerably more than two-thirds of the area of these four reservations is already subject to the criminal laws, police, and courts of Kansas. Under existing law if an offense is committed within the reservation boundaries, an inquiry must first be made to determine whether the place of its commission is trust land or unrestricted land, in order to ascertain whether the State or the Federal authorities have jurisdiction. If the offense is found to have been committed on trust land, an inquiry must then be made into the race of the victim and the offender as well as into the other facts of the case, in order to determine whether it falls within one of the Federal statutes applicable to Indian reservations. However, if the offense is by a person other than an Indian and is against a person other than an Indian, the State authorities have jurisdiction irrespective of whether the land is trust or unrestricted. The administrative difficulties incident to the maintenance of law and order within an area where the applicable rules of law, and the agencies charged with their enforcement, vary from holding to holding are manifest.

Reestablishment of the tribal courts would largely meet the difficulties resulting from the absence of a comprehensive Federal code of Indian offenses, but it would not meet all the difficulties involved, since tribal courts have jurisdiction only over Indians and may not punish white men for offenses committed upon Indians. Nor would expansion of the list of Federal offenses so as to cover all wrongful or illicit acts customarily penalized by State criminal codes completely answer the problems, since the unrestricted lands within the reservations would still continue under State control in criminal matters and the administrative difficulties resulting from checkerboard allotments would not be alleviated.

The four tribes located on the Kansas reservations do not desire reestablishment of the tribal courts, but have expressed a wish that the jurisdiction hitherto exercised by the State courts be continued. The tribal councils of all four tribes have gone on record in favor of a transfer of jurisdiction in criminal matters to the State, and the superintendent in charge of the Kansas reservations also recommends that this action be taken. The superintendent reports that for a number of years the local authorities of the State have willingly and effectively cooperated with the Indian Service to maintain the peace, and enforce law and order, on trust lands as well as on unrestricted lands within the reservation boundaries. The superintendent also states that in the State courts "an Indian may not only expect a square deal but, if anything, there is a tendency to be more lenient with him than with a white offender." As the Indian Service is not now in a position to establish a law-and-order set-up on these four reservations, the superintendent is of the opinion that the

maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection. Tribal courts could not function effectively without the wholehearted concurrence of the tribes concerned, and as has been already indicated, the members of these tribes prefer to be subject to State law in this particular. In short, the enactment of S. 372 will merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years.

The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that ~~they~~ continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Accordingly, the enactment of S. 372, amended as proposed in the report of this department, appears to offer the best solution for the present undesirable situation.

APPENDIX B

76TH CONGRESS) HOUSE OF (REPORT
3D SESSION) REPRESENTATIVES (No. 1523

CONFERRING JURISDICTION ON THE STATE OF KANSAS OVER OFFENSES COMMITTED BY OR AGAINST INDIANS ON INDIAN RESERVATIONS

APRIL 22, 1940. – Referred to the House Calendar and ordered to be printed

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Mr. BURDICK, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 3048]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 3048) to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian reservations, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

The amendments are as follows:

Strike all after the enacting clause and substitute the following:

That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on

Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Amend the title to read:

A bill to confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., April 17, 1940.

STATEMENT ON H. R. 3048 TO THE COMMITTEE ON INDIAN AFFAIRS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I want to urge that you recommend out of the committee H. R. 3048 with the suggested change in language in one place. All parties are agreed on this bill – the Indians, the superintendent, the Indian agencies on the Kansas reservations, which are all in my district, and the people that are on and surround the reservations.

This bill has been O. K.'d by the Indian Office through the Interior Department and I understand by the Department of Justice and no objection found to it by the Budget. The Government here relinquishes to the State

full jurisdiction over the Indians for small offenses. It will be in the interest of law and order and a unified law enforcement.

I sincerely hope that the committee recommends the bill for passage.

W. P. LAMBERTSON.

A communication from the Secretary of the Interior, submitting his report on this proposed legislation, follows:

THE SECRETARY OF THE INTERIOR,
Washington, March 16, 1940.

HON. WILL ROGERS,
Chairman, Committee on Indian Affairs, House of Representatives.

MY DEAR MR. ROGERS: Further reference is made to your request for a report on the bill (H. R. 3048), entitled "A bill to relinquish concurrent jurisdiction to the State of Kansas to prosecute Indians or others for offenses committed on Indian Reservations."

For the reasons outlined in this letter and the enclosed memorandum, I recommend favorable consideration of H. R. 3048, amended, for clarification, as proposed in this report.

The Federal criminal statutes applicable to Indian reservations are limited in their scope, particularly with respect to injuries inflicted by one Indian upon the person or property of another Indian, and leave some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts. As the authority of the several States over wrongful or illicit acts committed

upon tribal or restricted Indian lands extends in the main only to situations where both the offender and the victim are white men, the maintenance of law and order within Indian reservations is largely dependent upon tribal law and tribal courts. In the case of the four Kansas reservations, however, no tribal courts have existed for many years, and the Indians do not desire their reestablishment at this late date. With the approbation of the tribes concerned, the State courts of Kansas have in the past undertaken the trial and punishment of offenses committed on these reservations, including those covered by Federal statutes. The legality of this practice being questioned recently, the tribal councils of the four Kansas tribes have recommended the enactment of legislation authorizing its continuance by a transfer of jurisdiction to the State.

Moreover, due to the breaking up of the Kansas reservations through the issuance of unrestricted patents for most of the allotted lands, considerably more than two-thirds of the area within the reservation boundaries has passed beyond Federal jurisdiction in criminal matters, which under existing laws extends for the most part only to tribal and restricted lands, and has become subject to the general penal laws of Kansas and to its police authorities and criminal courts. The holdings that remain within the sphere of Federal jurisdiction are scattered in checkerboard fashion among the unrestricted holdings, thus subjecting the maintenance of law and order to many practical difficulties that can be most effectively met by conferring criminal jurisdiction over the entire area on the State. These considerations of administrative

convenience extend to those offenses which are now cognizable in the Federal courts under the reservation statutes as well as to those which are not.

The situation H. R. 3048 is designed to remedy presents some quite complex factors, and a memorandum developing in more detail the justifying circumstances is enclosed.

Since the tribes concerned desire the authorization and continuance of the criminal jurisdiction hitherto exercised by the State courts, and since the checkerboard pattern of the land technically subject to Federal jurisdiction makes other arrangements difficult of administration, the conferring of jurisdiction in criminal matters on the State of Kansas, as proposed in H. R. 3048, appears desirable. It is obvious that unless the State is permitted to exercise criminal jurisdiction over all lands within the reservation boundaries, various wrongful and illicit acts will probably escape punishment altogether, in view of the limited scope of the Federal penal statutes applicable to Indian reservations, and in view of the impracticability of reestablishing the tribal courts without the full concurrence of the Indians. Enactment of the bill will not prevent the prosecution in the Federal courts of those acts which are within the cognizance of these courts under existing law. While I do not wish to be understood as approving in general the relinquishment of criminal jurisdiction over tribal Indians to the States where their reservations are located, I believe the peculiar factors which exist in the case of the Kansas tribes justify the enactment of H. R. 3048.

However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law.

In order that the bill may more accurately reflect the legal situation I propose that the title of the bill be changed to read: "To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations," and that all after the enacting clause of the bill be stricken out and the following substituted:

"That jurisdiction is hereby conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

The Director of the Bureau of the Budget has advised me that there is no objection to the presentation of this report to your committee.

Sincerely yours,

(Signed) E. K. BURLEW,
Acting Secretary of the Interior.

MEMORANDUM ON H. R. 3048

The Federal criminal statutes applicable to Indian reservations do not provide a complete code for the maintenance of law and order within these reservations. Insofar as offenses committed by Indians against Indians are concerned, virtually the only acts penalized by Federal law are the ten major crimes listed in section 328 of the Criminal Code, as amended (18 U. S. C. 548), and the jurisdiction over all other offenses where both the offender and the victim are Indians is relegated to the tribes by section 2146 of the Revised Statutes, as amended (25 U. S. C. 218). Insofar as offenses committed by Indians against white men or by white men against Indians are concerned, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia," are extended to Indian reservations by section 2145 of the Revised Statutes (25 U. S. C. 217). However, the Federal penal statutes applicable to places within the sole and exclusive jurisdiction of the United States, as set out in sections 272-288 and 311-322 of the Criminal Code (18 U. S. C. 451-467, 511-522), cover only a limited number of offenses. And while for the purpose of filling in the gaps in this list section 289 of the

Criminal Code, as amended (18 U. S. C., Supp. IV, 468), extends certain State criminal laws to places under the exclusive jurisdiction of the United States, the application of this provision to Indian reservations over which the United States has not acquired exclusive political jurisdiction from the State is extremely uncertain. Offenses by Indians against non-Indians which fall within the 10 major crimes enumerated in section 328 of the Criminal Code, as amended, are expressly brought within the jurisdiction of the Federal courts by that section, but offenses by non-Indians against Indians are not subject to section 328, irrespective of their character. Insofar as offenses committed by white men against white men are concerned, the Supreme Court has held that the Federal statutes are inapplicable and that the trial and punishment of such offenses is a matter for the State, except where the reservation is located on lands over which the United States has acquired exclusive political jurisdiction by cession or otherwise. *United States v. McBratney* (104 U. S. 621); *Draper v. United States* (164 U. S. 240). In addition, a few other Federal criminal statutes, prohibiting for the most part the introduction or sale of intoxicating liquors, apply specifically to Indian reservations, and, or course, the general penal statutes which under the Constitution operate in all parts of the United States, such as those pertaining to counterfeiting, extend to these reservations.

On the four Indian reservations in Kansas, however, there are no tribal courts and there have been none for many years. In the absence of such courts, offenses committed on these reservations and involving Indians have been prosecuted in the State courts, even where the criminal act charged constituted one of the major offenses

listed in section 328 of the Criminal Code. For a considerable period the State courts accepted jurisdiction in the cases thus brought before them. These State law prosecutions were had with the approval of the tribes concerned, and the exercise of criminal jurisdiction by the State courts was to their general satisfaction. Recently, however, the authority of the State courts to proceed in these cases has been questioned, and it now appears that they are actually without authority to entertain such proceedings, as no jurisdiction over criminal offenses involving Indians has been relinquished to Kansas. Since tribal courts do not exist on the Kansas reservations, and since the jurisdiction of the Federal courts extends only to limited categories of offenses, many acts universally deemed wrongful, as, for example, the embezzlement by one Indian of money belonging to another Indian, may escape punishment if the present situation is not remedied.

Moreover, the breaking up of the Indian reservations in Kansas through the issuance of unrestricted patents for most of the allotted lands has made the maintenance of law and order by Federal authority administratively difficult. The superintendent in charge of those reservations reports that out of a total of about 115,900 acres of reservation land allotted to Indians of the four Kansas tribes only 34,937 acres remain in trust. The trust holdings are intermingled in checkerboard fashion with the approximately 80,963 acres of unrestricted holdings within the reservation boundaries. As Federal jurisdiction in criminal matters is at present almost wholly confined to tribal and restricted lands, and as the general criminal jurisdiction of the several States extends to unrestricted Indian

allotments, it follows that considerably more than two-thirds of the area of these four reservations is already subject to the criminal laws, police and courts of Kansas. Under existing law if an offense is committed within the reservation boundaries, as inquiry must first be made to determine whether the place of its commission is trust land or unrestricted land, in order to ascertain whether the State or the Federal authorities have jurisdiction. If the offense is found to have been committed on trust land, an inquiry must then b made into the race of the victim and the offender as well as into the other facts of the case, in order to determine whether it falls within one of the Federal statutes applicable to Indian reservations. However, if the offense is by a person other than an Indian and is against a person other than an Indian, the State authorities have jurisdiction irrespective of whether the land is trust or unrestricted. The administrative difficulties incident to the maintenance of law and order within an area where the applicable rules of law, and the agencies charged with their enforcement, vary from holding to holding are manifest.

Reestablishment of the tribal courts would largely meet the difficulties resulting from the absence of a comprehensive Federal code of Indian offenses, but it would not meet all the difficulties involved, since tribal courts have jurisdiction only over Indians and may not punish white men for offenses committed upon Indians. Nor would expansion of the list of Federal offenses so as to cover all wrongful or illicit acts customarily penalized by State criminal codes completely answer the problem, since the unrestricted lands within the reservations

would still continue under State control in criminal matters and the administrative difficulties resulting from checkerboard allotments would not be alleviated.

The four tribes located on the Kansas reservations do not desire reestablishment of the tribal courts, but have expressed a wish that the jurisdiction hitherto exercised by the State courts be continued. The tribal councils of all four tribes have gone on record in favor of a transfer of jurisdiction in criminal matters to the State, and the superintendent in charge of the Kansas reservations also recommends that this action be taken. The superintendent reports that for a number of years the local authorities of the State have willingly and effectively cooperated with the Indian Service to maintain the peace, and enforce law and order, on trust lands as well as on unrestricted lands within the reservation boundaries. The superintendent also states that in the State courts an Indian may not only expect a square deal, but if anything, there is a tendency to be more lenient with him than with a white offender. As the Indian Service is not now in a position to establish a law and order set-up on these four reservations, the superintendent is of the opinion that the maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection. Tribal courts could not function effectively without the wholehearted concurrence of the tribes concerned, and, as has been already indicated, the members of these tribes prefer to be subject to State law in this particular. In short, the enactment of H. R. 3048 will merely confirm a relationship which the State has willingly assumed, which

the Indians have willingly accepted, and which has produced successful results, over a considerable period of years.

The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes; the Indians desire that they continue to do so; and a division of jurisdiction with respect to particular crimes based upon the place of their commission is rendered undesirable by the mutual interspersion of restricted and unrestricted holdings. The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

Accordingly, the enactment of H. R. 3048, amended as proposed in the report of this Department, appears to offer the best solution for the present undesirable situation.